YII SUOK TING

v.

SIBU MUNICIPAL COUNCIL

HIGH COURT SABAH & SARAWAK, SIBU
TUAN HJ. MUHAMMAD KAMIL BIN AWANG J
[CIVIL APPLICATION NO. 1 OF 1984]
23 JUNE 1995

PRACTICE & PROCEDURE: *Bill of costs - Getting up - Item drawn up to RM45,000 - Taxed to RM15,000 by Registrar - Whether taxation justified - Application for certiorari and mandamus - Arguments on O. 53 Rules of High Court - Whether simple and uncomplicated - Demarcation between public law and private rights - Whether difficult legal issues involved.*

The applicant was a salted vegetable seller and was trading at the Lembangan Market, Sibu, under a permit issued by the respondent. The applicant's application to renew the permit for the first quarter of 1984 was rejected by the respondent. Notwithstanding the rejection the applicant continued with her trade thereat albeit without a permit. On 15 June 1984 the respondent served upon the applicant a notice ordering her to vacate her stall. Dissatisfied, the applicant filed an originating motion in the High Court and obtained leave for an order of *certiorari* and *mandamus* and a stay of proceedings until the final disposal of the case. Ten years later, the High Court granted an order of *certiorari* quashing the order of the Council and an order of *mandamus* directing the Council to renew the applicant's permit and costs of the application to the applicant to be taxed. The applicant drew up RM45,000 for getting-up and the Registrar taxed the sum down to RM15,000 on the basis *inter alia* that O. 53 was clear as to what steps to be taken and that the case was not a complicated case. The applicant applied to the High Court for a review of the learned Registrar's order.

Held:

[1] The extent of a private right that transcends into a public right is always difficult to discern, as well-illustrated in this case when the private right of a salted vegetable seller seems to have clashed with the right of a public authority to regulate and control that right. It is the grey area of the law and the demarcation has always been unclear. Burdensome though it may be Counsels had skillfully expounded the laws so lucidly that it was indeed so convincing in showing the issues raised. The Registrar had clearly ignored the importance of this distinction between private and public law and had thus come to a wrong conclusion on the complexity of the case.

[2] It is true that a public authority has a right to regulate and control over a seller/salesman in a public place but that right must be exercised within the parameters of the law. It is of paramount importance that the authority must act in accordance with the law from which its right emanates. It must exercise its right within the constraints of the law. Where there is no provision in the law then the exercise of such a right is wrong, the authority has acted arbitrarily, and the act ceases to be lawful. The Court may in such a case intervene for bureaucracy must be kept in place.

[3] Order 53 may appear to be deceptively simple but it is far from being a procedure which is clear cut and precise. There are numerous judicial pronouncements and yet the procedure remains uncertain. Clearly O. 53 proceedings is technical, complicated and stringent. The Registrar's conclusion in respect of O. 53 shows that he did not fully appreciate the facts of

this case. The failure to painstakingly deal with or investigate a case under O. 53 in this case had led the Registrar to improperly dismiss the points raised by Counsel in respect of this Order.

[4] The case is not an easy case. There are many complicated issues of both facts and law involved. The initial hearing of the case was held on 1 August 1984 which was more than 10 years ago. Very extensive and exhaustive legal research had been done on the various elements of the law and especially in the field of public and private law. On top of that there were numerous judicial pronouncements which need to be perused and studied. In view of the complexity, the numerous issues involved, the difficult and complicated points of law, which took the Counsels three full days for submissions, and taking into consideration the precedents, the present day inflation and the long lapse of time before the case was finally disposed of, a sum which is just and fair would be RM30,000.

[Sum for getting-up enhanced to RM30,000; Costs of review to the plaintiff]

Cases referred to:
Stokeley, Yorkshire Justice, ex parte & Bartram [1956] 1 WLR 254 ***(refd)***
Sungei Wangi Estate [1975] 1 MLJ 136 ***(refd)***
Cik Aniza Yaacob v. Mostek Malaysia Sdn. Bhd. [1988] 1 MLJ 451 ***(refd)***
Melayu Raya Press Ltd. v. WL Blythe The Colonial Secretary [1951] MLJ 89 ***(refd)***
Welltrade Middle East Ltd. & Anor. v. PJ Wakelin & Ors. [1984] 1 MLJ lXIV ***(refd)***
Teo Soh Lung v. The Minister of Home Affairs & 2 Ors. [1992] 2 CLJ 943 ***(refd)***
Vincent Cheng Kai Chuen v. The Minister of Home Affairs & 2 Ors. [1992] 2 CLJ 945 ***(refd)***
Keruntum Sdn. Bhd. v. The Government Of Sarawak, OM Kg. No. 5/1987 ***(refd)***
Canopee Investment Pte. Ltd. & Ors. v. Landmarks Holding Sdn. Bhd. & Ors. [1990] 1 MLJ 292 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 53

Other source referred to:
Crown Office Proceedings, Richard Gordon

For the applicant - Chong Siew Chiang; M/s. Chong Brothers
For the respondent - Dr. Chew Peng Hui; M/s. Battenberg & Talma

JUDGMENT

Hj. Muhammad Kamil Bin Awang J:

This is an application to the Judge for a review of the order of the learned Senior Assistant Registrar dated 16 September, 1994 in respect of Item 32 of the bill of costs for getting-up. Item 32 was drawn up at RM45,000 and was allowed in taxation RM15,000 and affirmed on review by the Senior Assistant Registrar on 21 October 1994.

The factual background is briefly as follows:

The applicant, a salted vegetable seller at Lembangan Market, Sibu was trading under a permit, Green Card No. 25/VS/LM/81 issued by the Municipal Council. It was a quarterly renewal permit which was due to expire by December 1983. Never before had renewal been refused but this time it was refused. In fact Sibu Municipal Council had detained the said unexpired permit. Despite that several attempts had been made, the renewal of the permit was never allowed. Nonetheless the stall rentals for January and February 1984 were paid by the applicant who went on trading as before uninterrupted.

On 15 June 1984 the Council served upon the applicant a notice ordering her to vacate her stall within 3 days as she had no permit. She then filed an originating motion in the High Court and obtained leave for an order of *certiorari* and *mandamus*, and a stay of proceedings until the final disposal of the case. Ten years last past, on 12 April 1994, the High Court granted an order of *certiorari* to remove into this honourable Court for the purpose that the order dated 15 June 1984 be quashed and an order of *mandamus* directing the Council to allow the renewal of the applicant's permit in accordance with the laws and costs of the application to the applicant to be taxed. There was no appeal.

In the case the applicant drew up RM45,000 for getting-up and the registrar taxed that sum down to RM15,000 but offered no explanation as to how he arrived at the figure. It appears that it was based on his views that "O. 53 is clear as to what steps to be taken. The legal issues are many but they are not complicated too. To say this case is so difficult is not correct." His conclusion is startling as no explanations were given thereto, and based apparently on a notion of the law so inadequate, devoid of any legal principles in support. It appears to be more of guess-work than anything else.

As regards to a getting-up it is decided upon the following matters:

(a) The complexity element of the law and fact in the case.

(b) The complex issues involved.

(c) The skill and specialised knowledge and responsibility required of, the time and labour expended by the Counsel.

(d) The importance of the matter to the client.

(e) The amount of documents and the authorities to be looked up, considered and studied.

(f) The length of the hearing and Counsel's submission.

This case is not an easy case. There are many complicated and difficult issues of both facts and law involved. The initial hearing of the case was held on 1 August 1984 before the learned Datuk Tan J, i.e. more than 10 years ago. There is evidence to show that the learned Counsel for the applicant had sought an expert legal opinion of a Queen Counsel in England in respect of the right to cross-examination on an affidavit.

At the continued hearing (10 years later), both the parties retained the same Counsels who are drawn from the ranks of very senior and experienced lawyers, one of whom is reputed to have achieved an academic excellence. Very extensive and exhaustive legal research had been done on the various elements of law especially in the field of public law and private law. An eminent author, Richard Gordon in his book "*Crown Office Proceedings*" states that: "The distinction between public and private law is not easy to draw." And there are numerous judicial pronouncements which need to be perused and studied, voluminous English, Malaysian and other cases, not less than 30 cases, were referred to in the trial such as the House of Lords case: *O'Reilly v. Mackman* [1982] 3 All ER 1124; *Bradford Corporation v. Myers* [1916] AC 242; and *Government of Malaysia v. Lee Hock Ning* [1973] 2 MLJ 51. The extent of a private right that transcends into a public right is always difficult to discern, as well-illustrated by this case, the right of a salted vegetable seller *vis-a-vis* the right of a public authority to regulate and control over that right. It is true that a public authority has a right to regulate and control over a seller/salesman in a public place but that right must be exercised within parameters of the law. It is of paramount importance that the authority must act in accordance with the law from which its right

emanates. It must exercise its right within the constraints of the law. Where there is no provision in the law then the exercise of such a right is wrong, the authority has acted arbitrarily, and the act ceases to be lawful. The Court may in such a case intervene for bureaucracy must be kept in its place.

The applicant in this case appears to be on a lone crusade against what seems to be an unjust law. She had a reasonable expectation that her permit would be renewed. The renewal of her permit means everything to her. The deprivation of the right (to renew the permit) was devastating to her. It means the cutting-off a lifeline. It is the unkindest cut of all. The demarcation between a private right and a public right has always been unclear. It is the grey area of the law, burdensome though it may be, the learned Counsels on both sides had skillfully expounded the laws so clearly and lucidly that it was indeed convincing and helpful in solving the issues raised. In my view the Registrar had ignored the importance of this distinction between private and public law and, therefore, he had come to a conclusion wrongly.

Order 53 may appear to be deceptively simple but it is far from being a procedure which is clear-cut and precise. There are numerous judicial pronouncements and yet the procedure remains uncertain. The O. 53 proceedings is technical, complicated and stringent. Datuk Tan J suggested the review of O. 53, to bring it in line with the amended version of the English O. 53. Datuk Tan J in his judgment, in this case on 8 December 1984 when rejecting the application for cross-examination on the affidavit of Vice-Chairman of the Council, said:

> It is unfortunate, in my view, that our present procedure is not similar to the existing corresponding English procedure so that it would be open for me to order cross-examination whenever the justice of a particular case so requires... Perhaps the time is opportune for the Rules Committee to consider whether any amendment should be made to O. 53.

This show how technical O. 53 procedure is and that the learned Judge felt so bound by the authority of *Stokeley, Yorkshire Justice, ex parte & Bartram* [1956] 1 WLR 254.

The application for *certiorari* is complicated and technical. See *Sungai Wangi Estate* [1975] 1 MLJ 136; *Cik Aniza Yaacob v. Mostek Malaysia Sdn. Bhd.* [1988] 1 MLJ 451 and *Melayu Raya Press Ltd. v. WL Blythe The Colonial Secretary* [1951] MLJ 89.

The learned Senior Assistant Registrar said that:

> On the issue of whether special knowledge and responsibility will be required of Counsel for O. 53 proceedings ... There is no material before the Court of this. Therefore I will refuse this ground.

It is obvious that he did not appreciate fully the facts of this case. The failure to painstakingly deal with or investigate a case under O. 53 as in this case led the Registrar to wrongly dismiss this point.

The submission of the Counsels were lengthy and among the legal matters were the principles or doctrines of natural justice, *ultra vires*, reasonableness, limits of the local authority powers, statutory interpretations, general principles on prerogative orders of *certiorari* and *mandamus*. The applicant's Counsel submitted a 21-page written submission with voluminous case law and reports, textbooks, that was matched by an equally lengthy submission by the respondent's Counsel which, *inter alia*, a number of cases in 6 bundles of authorities and 10 affidavits. The submissions by both Counsels took no less than 3 full days. In *Welltrade Middle East Ltd. & Anor. v. PJ Wakelin & And Ors.* [1984] 1 MLJ lxiv

the application for discharge of interim injunction which took 1½ days of arguments, the Judge allowed the getting-up at RM22,000

In *Teo Soh Lung v. The Minister of Home Affairs & 2 Ors.* [1992] 2 CLJ 943 an application for *habeas corpus* was dismissed by the High Court. The Judge allowed the getting-up drawn up at RM50,000 to be reduced to RM30,000 on review.

In *Vincent Cheng Kai Chuen v. The Minister of Home Affairs & 2 Ors.* [1992] 2 CLJ 945, a *habeas corpus* case where the proceedings lasted 5 days, the getting-up was allowed RM80,000. In *Keruntum Sdn. Bhd. v. The Government of Sarawak,* Origination Motion Kg. No. 5/1987 a case of *certiorari* which lasted 2 days of hearing, the getting-up at RM20,000.

In *Canopee Investment Pte. Ltd. & Ors. v. Landmarks Holdings Sdn. Bhd. & Ors.* [1990] 1 MLJ 292 the getting-up was drawn at RM15,000 and allowed by the Court at & RM12,500. The Judge states that (at p. 293):

> The taxing officer of the High Court would be welladvised to give a monetary value to the action if at all that is possible and when that has been done to apply the Subordinate Courts Rules 1980 with adjustments using the said policy of the grading system to reflect the quantum of the subject-matter where it is found to be over RM100,000 ... For the more complicated cases and those not as common place as running down actions, there should be a gradual scaling upwards of the costs for getting-up from that starting point of what should be awarded in a running down action.

In this case it is difficult to give a monetary value to the action. In view of the complexity, the numerous issues involved, the difficult and complicated points of law, which took both Counsels 3 full days for submissions, and taking into consideration the precedents, the present day inflation and the long lapse of time before the case was finally disposed of, I feel a sum which is just and fair in the circumstances would be RM30,000 I would therefore allow the sum for getting-up to be enhanced to RM30,000 at 8% interest from the date of judgment i.e. 12 April 1994. Costs of this review at RM600 to the applicant.

The Senior Assistant Registrar's certificate is to be amended accordingly.